Supreme Court, U.S.
FILED
OCT 25 1999
OFFICE OF THE CLERK

No. 99-345

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

COUNTY OF COOK, ILLINOIS, MARIA PAPPAS, COUNTY TREASURER AND COUNTY COLLECTOR OF THE COUNTY OF COOK, ILLINOIS, DAVID D. ORR, CLERK OF THE COUNTY OF COOK, ILLINOIS, JAMES M. HOULIHAN, ASSESSOR OF COOK COUNTY, AND THE PEOPLE OF THE STATE OF ILLINOIS, ON RELATION OF MARIA PAPPAS AND THE COUNTY OF COOK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois
PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5365

MARK RICHARD DAVIS
Counsel of Record
JASON T. SHILSON
O'KEEFE, ASHENDEN, LYONS & WARD
30 North LaSalle Street
Suite 4100
Chicago, Illinois 60602
(312) 621-0400

Attorneys for Respondents

155671

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the United States' claim, challenging interest and penalties defined by Illinois law as part of the delinquent taxes it owed on certain federal buildings, was barred by *res judicata* under the judgment in a prior case where the United States sought complete declaratory and injunctive relief from collection of the same taxes.

2. Whether the United States' claim of sovereign immunity from interest and penalties defined by Illinois law as part of the delinquent taxes it owed was waived in any event by Congressional consent to taxation in 40 U.S.C. § 602a(d).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Background: State Taxation of § 602a Buildings and the Illinois Litigation	2
B. The Aftermath of *Hynes* and the Instant Case	4
C. The District Court's Decision	10
D. The Seventh Circuit's Decision	12
Reasons for Denying the Writ	13
I. Review On The Question Of *Res Judicata* Is Unwarranted.	13
II. Review On The Merits Is Also Unwarranted.	27
Conclusion	29
Appendix — Supplemental Brief Of The United States Of America Dated June, 1992	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Blinder, Robinson & Co., Inc. v. Securities & Exchange Commission, 837 F.2d 1099 (D.C. Cir. 1988) 22

Driskill, Inc. v. Abdnor, 901 F.2d 383 (4th Cir. 1990) 21

Durfee v. Duke, 375 U.S. 106 (1963) 17

Edwards v. U.S. Department of Justice, 43 F.3d 312 (7th Cir. 1994) 21

Federal Reserve Bank v. City of Richmond, 957 F.2d 134 (4th Cir. 1992) 12, 27, 28

Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) .. 22

Great Northern Life Insurance Co. v. Reed, 322 U.S. 47 (1944) 17

Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906) 23, 24

Hans v. Louisiana, 134 U.S. 1 (1890) 21, 22

In Re Application of County Collector (etc.) v. J&J Partnership, 155 Ill.2d 520, 617 N.E.2d 1192 (1993) 7

Cited Authorities

Page

In Re Application of Rosewell, 97 Ill.2d 434, 454 N.E.2d 997 (1983) 7

In Re Bulldog Trucking Incorporated, 147 F.3d 347 (4th Cir. 1998) 22

Jackson v. Irving Trust Co., 311 U.S. 494 (1941) 17, 18, 19, 20, 21, 25

Montana v. United States, 440 U.S. 147 (1979) ... 23, 24

Nevada v. United States, 463 U.S. 110 (1983) 23, 24

Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204 (1946) 12, 27, 28

Reconstruction Finance Corporation v. Texas, 229 F.2d 9 (5th Cir. 1956), *cert. denied*, 351 U.S. 907 (1956) 27

S. Urban, Jr. v. Lois, Inc., 29 Ill.2d 542, 194 N.E.2d 294 (1963) 9

Sorenson v. Sutherland, 109 F.2d 714 (2d Cir. 1940), *affd. sub nom. Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941) 18

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 28

Cited Authorities

Page

United States v. Consumers Scrap Iron Corporation, 384 F.2d 62 (6th Cir. 1967) 27

United States v. County of Cook, 725 F.2d 1128 (7th Cir. 1984) 1, 2, 3, 4, 5, 6, 25

United States v. County of Cook, 170 F.3d 1084 (Fed. Cir. 1999) 10, 11

United States v. County of Cook, et al., No. 91 C 6626 (N.D. Ill., dismissed 12/2/91) 1, 8, 26

United States v. County of Cook, Illinois, 1997 WL 639049 (N.D. Ill. 1997) 11

United States v. Hynes, 20 F.3d 1437 (7th Cir. 1994) ..... *passim*

United States v. Hynes, 771 F. Supp. 928 (N.D. Ill. 1991) 8, 26

United States v. Hynes, 759 F. Supp. 1303 (N.D. Ill. 1991) 7

United States v. Lewis County, Washington, 175 F.3d 671 (9th Cir. 1999), *petition for cert. pending*, No. 99-48 ..... 27, 28

United States v. Mays, 264 F.2d 317 (10th Cir. 1959) 27

Cited Authorities

Page

United States v. Sherwood, 312 U.S. 584 (1941) .. 21

United States v. Stauffer Chemical Co., 464 U.S. 165 (1984) 23, 24

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) ..... *passim*

Statutes:

28 U.S.C. § 1292(d)(4)(A) 10

28 U.S.C. § 1345 15

28 U.S.C. § 1500 10

28 U.S.C. § 1631 10

40 U.S.C. § 602a 2, 3

40 U.S.C. § 602a(d) ..... i, 1, 2, 3, 4, 5, 12, 27

Ill. Rev. Stat. 1979, ch. 120, ¶ 500.4 3

Ill. Rev. Stat. 1985, ch. 120, ¶ 500.9a, as amended by P.A. 83-1371, recodified as § 15-80 of the Property Tax Code, 35 ILCS 200/15-80 ..... 2, 3, 4

Illinois Property Tax Code enacted by P.A. 88-455, effective Jan. 1, 1994 4

Cited Authorities

	Page
Kan. Stat. Ann. § 79-201a	3
35 ILCS 200/1-145 (1996), recodifying 35 ILCS 205/1(11) (1992), previously codified as Ill. Rev. Stat. 1991, ch. 120, ¶ 482(11)	7
35 ILCS 200/21-90	8
35 ILCS 200/21-90, 21-355(c)-(d)	8
United States Constitution:	
Article VI, clause 2 (Supremacy Clause)	10, 20
Fifth Amendment	5
Other Authority:	
C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction § 4429 (1981)	22

Respondents, the taxing authorities of Cook County, Illinois, the County of Cook, and the People of the State of Illinois, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case. The Seventh Circuit's opinion is reported at 167 F.3d 381 (1999).

STATEMENT OF THE CASE

This is the fourth successive action brought by the United States at the request of the General Services Administration ("GSA") to prevent the enforcement of Illinois property taxes on two federal buildings in Chicago, the Harold Washington Social Security Center and the National Archives and Records Administration ("subject buildings").[1] In 1994 the Seventh Circuit held *en banc* that such taxes for 1985 and following tax years were constitutionally valid pursuant to express Congressional authorization (40 U.S.C. § 602a(d)). *United States v. Hynes*, 20 F.3d 1437 (7th Cir. 1994) ("*Hynes*"). *Hynes* overruled in part the Seventh Circuit's decision in *United States v. County of Cook*, 725 F.2d 1128 (7th Cir. 1984) ("*County of Cook I*"), which had addressed taxes for the years 1972-1978.[2] The United States did not seek review of *Hynes* in this Court.

---

1. In sequence, the four cases are: (1) *United States v. County of Cook*, 725 F.2d 1128 (7th Cir. 1984) ("*County of Cook I*"); (2) *United States v. Hynes*, 20 F.3d 1437 (7th Cir. 1994); (3) *United States v. County of Cook, et al.*, No. 91 C 6626 (N.D. Ill., dismissed 12/2/91) ("*County of Cook II*"); and (4) the present case.

2. The petition for a writ of certiorari ("Petition for Certiorari" or "Petition") erroneously states that *County of Cook I* addressed tax years "1977-1984." Petition at 8. That case actually addressed the largely earlier period noted above. 725 F.2d at 1130.

A. Background: State Taxation of § 602a Buildings and the Illinois Litigation

Similar federal buildings were built for GSA throughout the United States, financed by installment contracts under 40 U.S.C. § 602a ("602a"). Many such contracts were in force until 1993. App. Ptn. at 74a, ¶ 22.[3] The contracts placed legal title to the buildings in third parties while installment payments were made, although the United States had equitable ownership. App. Ptn. at 71a, 73a, ¶¶ 13, 19. Congress authorized state and local taxation during the installment period in 40 U.S.C. § 602a(d) ("602a(d)"), ending for each building when legal title passed to the United States. Legal title to all § 602a buildings throughout the country has now passed to the United States through prepayment of the installment contracts. App. Ptn. at 74a, ¶ 22. This included the contracts on the subject buildings, eliminating all taxes after tax year 1993. App. Ptn. at 71a, 73a, ¶¶ 14, 20.

GSA willingly and timely paid more than $270 million in state and local taxes on fifty-six § 602a buildings in thirty-two states during the period of 1977-1993. App. Ptn. at 74a, ¶ 22. Illinois is the only state where the United States ever contested the basic liability of § 602a buildings to taxation. App. Ptn. at 75a, ¶ 24. The United States claimed exemption in Illinois alone despite the similarity of its tax and exemption laws to those of the other states where the taxes were paid. *Hynes*, 20 F.3d at 1442-43.

In *County of Cook I*, the Seventh Circuit held the taxes on the subject buildings invalid under an Illinois statute exempting property being purchased by a "governmental body" on an installment basis. 725 F.2d at 1130-31, construing Ill. Rev. Stat. 1979, ch. 120, ¶ 500.9a ("former ¶ 500.9a"). This ruling came

---

3. References to documents in the appendix to the Petition for Certiorari are designated "App. Ptn. __"; references to the record on appeal in the Seventh Circuit are designated "R [Doc. No.] __" (original record) or "RSupp [Doc.] __" (supplemental record).

despite the exception for property taxed by Congressional consent, concededly triggered by § 602a(d), in another Illinois statute generally exempting "property of the United States." 725 F.2d at 1130, discussing Ill. Rev. Stat. 1979, ch. 120, ¶ 500.4.

Contrary to the statement in the Petition for Certiorari, the buildings did not fall "precisely within the scope of [the] state-law exemption" under former ¶ 500.9a. See Petition at 4. Rather, as the Petition acknowledges on the next page, the parties sharply disputed whether former ¶ 500.9a limited this exemption to state or local "governmental bodies." 725 F.2d at 1130-31. The Seventh Circuit resolved this dispute by holding that the United States had to be considered a "governmental body" under the Illinois law, or else that law would "discriminate" against the United States in violation of the U.S. Constitution's Supremacy Clause. 725 F.2d at 1131.[4]

Following *County of Cook I*, the Illinois General Assembly amended former ¶ 500.9a effective January 1, 1985, to exclude

4. This state-law exemption dispute also illustrated the United States' disparate treatment of Illinois and other states with § 602a buildings. In 1976 GSA wrote the Kansas attorney general that Kan. Stat. Ann. § 79-201a, a then-unqualified exemption for federal property, barred tax payments under § 602a(d). GSA's letter invited further consideration "to ensure that available funds for payment of local taxes . . . are not lost." RSupp Loc. Rule 12(n) Stmt. ¶ 68, Ex.A at 00023. In 1979 § 79-201a was amended to except "property which Congress has expressly declared to be subject to state and local taxation." The amended Kansas law was essentially identical to Ill. Rev. Stat. 1979, ch. 120, ¶ 500.4, excluding from an otherwise general exemption property which Congress subjected to taxation. *See* Petition for Certiorari at 4; *see also Hynes*, 20 F.3d at 1441 n.4, quoting *County of Cook I*, 725 F.2d at 1130. Kansas also exempted only state and local governmental installment purchase property under *amended* § 79-201a, as did Illinois under *former* ¶ 500.9a. GSA nonetheless proceeded to pay taxes in Kansas while it contested them in Illinois. R59, ¶ 23, Ex. 1 at 1a; RSupp Loc. Rule12(n) Stmt. ¶ 68, Ex.A at 00009-00012.

from the scope of the exemption all property of "governmental bod[ies]" which had consented to taxation. Ill. Rev. Stat. 1985, ch. 120, ¶ 500.9a, as amended by P.A. 83-1371, recodified as § 15-80 of the Property Tax Code, 35 ILCS 200/15-80 ("amended" ¶ 500.9a).[5] The United States responded in 1988 by filing its complaint in *Hynes*.

In *Hynes*, the United States claimed that amended ¶ 500.9a was unconstitutionally discriminatory, in that it failed to exempt the subject buildings while permitting the exemption of state and local governmental property. 20 F.3d at 1440. However, the Seventh Circuit upheld amended ¶ 500.9a and overruled *County of Cook I*, to the extent the earlier opinion held that taxing the subject buildings while exempting similar Illinois governmental property would discriminate against the United States, and to the extent it held that § 602a(d) was insufficient federal consent to such taxation. *Id.* at 1441.

B. The Aftermath of *Hynes* and the Instant Case

GSA did not pay any part of the taxes on the subject buildings before the Seventh Circuit's *Hynes* decision. App. Ptn. at 76a, ¶ 27. On August 19, 1994, GSA paid some taxes which had been billed after *Hynes* and on which no delinquent interest penalties had accrued under state law. App. Ptn. at 89a, ¶ 60. It did not pay any of the remaining taxes for 1985-1993, on which delinquent interest penalties had accrued.

In August, 1994, GSA offered to pay the delinquent *principal* 1985-1993 taxes "on the condition that any such payment is applied to the taxes only, and not to any accrued

---

5. The Illinois Property Tax Code enacted by P.A. 88-455, effective Jan. 1, 1994, recodified the prior Illinois Revenue Act without substantive change. Amended § 15-80 is identical to "amended ¶ 500.9a" as discussed in *Hynes* and other prior opinions, and to facilitate reference to such opinions this brief continues to use the older designation.

penalties and/or interest." R85, ¶ 70, Ex. A (8/23/94 letter). Respondents refused because Illinois law applied any payment first to interest penalties and only then to principal, and the law also forbade partial redemption of delinquent tax liens. *Id.* (11/15/94 letter). They proposed that GSA pay the principal tax amounts in escrow without prejudice to either party's position regarding interest penalties. *Id.* GSA did not accept the proposal and the United States filed the instant action on November 28, 1994. Respondents counterclaimed seeking collection of all the "taxes" due under § 602a(d) and Illinois law, and alternatively, seeking compensation for the failure to pay the taxes when due as a taking of property in violation of the Fifth Amendment to the United States Constitution.

After pre-trial conferences with the district court, the parties entered into an agreed order dated February 16, 1995, adopting a version of the escrow proposal. App. Ptn. at 90a, ¶ 63. Respondents settled their claim under state law for future interest penalties as a condition of the United States' payment, without prejudice to either party's position on interest or penalties accrued before the deposit or on claims including interest or penalties for 1977-1984 taxes.[6] R59 Ex. 38 ¶¶ 3-4. The parties agreed that the principal 1985-1993 tax amount was $32,202,455.91 and the disputed 1985-1993 interest penalties amounted to $33,160,834.08. App. Ptn. at 90a-91a, ¶¶ 63-64. GSA deposited the 1985-1993 principal tax amount in the escrow on March 1, 1995. *Id.* These funds remain in the escrow today.[7]

---

6. These earlier taxes were alleged to be due under current Illinois law and to be beyond any *res judicata* effect of *County of Cook I*.

7. The district court's judgment in the instant case of November 17, 1997, provided for distribution of all the escrowed funds to the Cook County Collector after all appellate proceedings were concluded. App. Ptn. at 65a.

Respondents did not counterclaim in *Hynes* or in *County of Cook I*. Instead, they tried to enforce the taxes by pursuing judgments and orders of tax sale against the buildings in the Circuit Court of Cook County. App. Ptn. at 70a, 80a-81a, ¶¶ 30, 40. Before, during and after the *County of Cook I* litigation, and during the *Hynes* litigation, the County Collector applied for judgment and order of sale of the liens for unpaid taxes for each of tax years 1977-1993. App. Ptn. at 78a, 81a, 91a, ¶¶ 34, 41, 66. The Collector offered the subject tax liens at each annual tax sale pursuant to the Illinois Revenue Act and the state court judgment and order of sale. *Id.* The liens were not purchased at the annual sales and the buildings were marked "forfeited" to the State of Illinois pursuant to the Revenue Act for each year, except 1984 where they were marked "exempt." App. Ptn. at 78a-79a, 81a, 91a, ¶¶ 35, 42, 66.

The Petition for Certiorari equivocates when it claims that the *Hynes* complaint merely "noted" the accrued delinquency interest, but "did not separately address or seek relief from interest or other late-payment charges." *See* Petition at 6. The *Hynes* complaint attacked both interest penalties and the tax liens imposed on the subject buildings pursuant to Illinois statutes:

> Penalties and interest (at the rate of 1.5% per month) have been accruing and by statute liens for the unpaid taxes have been placed on the properties.

R59, Ex. 10 ¶ 19. The complaint sought to enjoin respondents from "assessing, imposing, or collecting (or attempting to do so)" *all* of the taxes. *Id.* at 7. It was expressly undisputed in *Hynes* that "taxes" were defined under Illinois law to include interest and penalties on unpaid principal amounts.[8] R59, Ex.

8. At all times Illinois law defined "tax" or "taxes" as: "Any tax, special assessments or costs, *interest or penalty* imposed upon property." (Cont'd)

11, Defs. Loc. Rule 12(l) Stmt., Pltf. Rsp. ¶ 14. Consequently the United States did "seek relief from interest or other late-payment charges" when it challenged all taxes and liens within the state-law definition, and it did "separately" identify "penalties and interest" as part of the charges of which it complained. In March, 1991, the district court initially granted summary judgment exempting petitioner from all Illinois taxes. *United States v. Hynes*, 759 F. Supp. 1303, 1309 (N.D. Ill. 1991). Had it stood, that judgment would plainly have barred the "interest or other late-payment charges" imposed as part of those taxes. *See also infra* at 9-10, n.12.

In April, 1991, while respondents' motion to reconsider the original *Hynes* judgment was pending, they advised the United States by court filing, telephone and letter of an upcoming "scavenger" tax sale, noting that "[a]bsent an injunction, the defendant Collector is bound by statute to collect the taxes extended against the subject properties."[9] App. Ptn. at 83a, 84a, ¶¶ 47-48. In July, 1991, respondents wrote again to the United States advising that the sale would begin in August but the subjects would not be sold prior to October. *Id.* ¶ 48. On July 25, 1991, the United States wrote to the district court to request a decision on the motion to reconsider, stating:

> both parties agree that the properties . . . will be offered for sale at this scavenger sale absent payment of the tax or an injunction from this Court.

(Cont'd)
35 ILCS 200/1-145 (1996), recodifying 35 ILCS 205/1(11) (1992), previously codified as Ill. Rev. Stat. 1991, ch. 120, ¶ 482(11) (emphasis supplied). *See also In Re Application of County Collector (etc.) v. J&J Partnership*, 155 Ill.2d 520, 617 N.E.2d 1192, 1195 (1993).

9. Under Illinois law, a "scavenger" tax sale is a supplemental tax collection device which is used periodically after the "annual" tax sales (to which the subject buildings were repeatedly exposed) have been exhausted. *See In Re Application of Rosewell*, 97 Ill.2d 434, 442-43, 454 N.E.2d 997 (1983).

Id. The state court ordered sale of the tax liens in August, 1991. App. Ptn. at 84a, ¶ 49. Meanwhile, the district court reconsidered its earlier ruling. In September, 1991, the court enjoined collection of only the 1985 taxes, not those for 1986-1989. *United States v. Hynes*, 771 F. Supp. 928, 933 (N.D. Ill. 1991).

In an episode the Petition for Certiorari fails to mention at all, when the district court's final *Hynes* judgment refused to enjoin collection of 1986-1989 taxes, the United States filed *United States v. County of Cook*, No. 91 C 6626 (N.D. Ill.) ("*County of Cook II*"), on October 16, 1991. This suit, almost literally identical to the present complaint, sought a temporary restraining order and injunction against imposition of interest or penalties, and against the tax sale. App. Ptn. at 84a-85a, ¶ 50. On the County Collector's motion on October 17, 1991, the state court postponed the tax sale. App. Ptn. at 85a, ¶ 51.[10] On November 4, 1991, the Cook County Board resolved to exercise its statutory authority (35 ILCS 200/21-90) to buy the subject tax liens by non-cash purchase, to secure collection of any taxes ultimately due and to prevent intrusion of any private tax purchaser. App. Ptn. at 85a-86a, ¶ 52. On November 8, 1991, respondents moved to dismiss *County of Cook II* on *res judicata* and other grounds. App. Ptn. at 86a, ¶ 53. On November 15, 1991, the district court refused the temporary restraining order sought by the United States, based on the County's resolution to buy the tax liens, and it set the *res judicata* motion for briefing. *Id.* On November 25, 1991, the United States voluntarily dismissed *County of Cook II*. App. Ptn. at 86a-87a, ¶ 54.

---

10. At the same time the state court removed the 1985 taxes from its tax sale judgment pursuant to the district court's injunction, without prejudice to reinstating them if the injunction were reversed. App. Ptn. at 85a, ¶ 51. On April 25, 1994, the state court reinstated the 1985 taxes in the tax sale due to reversal of the district court's injunction in *Hynes*. App. Ptn. at 88a, ¶ 58. Delinquent taxes for 1990-1993 were then added to the sale pursuant to statute (35 ILCS 200/21-90, 21-355(c)-(d)). App. Ptn. at 88a-89a, ¶ 59.

The County purchased the subject tax liens in December, 1991, and extended the tax sale redemption period to December, 1994, to accommodate the *Hynes* appeal. App. Ptn. at 85a-86a, ¶ 52. The County served certain notices required by statute and, on August 8 and 11, 1994, it filed supplemental petitions in the tax sale proceeding seeking tax deeds to the subject buildings if they were not redeemed.[11] App. Ptn. at 89a-90a, ¶ 61.

The statement in the Petition for Certiorari that, "[i]n response to the County's enforcement actions, the United States commenced the present action in federal district court," is belied by the timing and nature of these events. *See* Petition at 8. As noted above, the tax sale proceeding began in state court in 1991, not 1994; the statutory tax liens offered at the sale were in place, and similar sales had occurred, before the *Hynes* complaint was filed. The tax deed petitions were merely supplemental steps in the tax sale proceeding, *S. Urban, Jr. v. Lois, Inc.*, 29 Ill.2d 542, 546, 194 N.E.2d 294, 296 (1963), not new enforcement actions as the United States suggests. The United States did not file the present action until November 28, 1994, three months after the supplemental petition filings, and over three years after the tax sale was ordered in state court. R1; *see* Petition at 7-8.

Respondents moved for summary judgment, arguing that *res judicata* barred the United States' claim, and alternatively that the claim failed on the merits. The United States filed a cross-summary judgment motion for the declaratory and injunctive relief sought in its complaint.[12]

---

11. On November 29, 1994, the day after the present action was filed, the state court on the County's motion stayed all proceedings on the tax deed petitions pending a final ruling by the federal courts. (App. Ptn. at 90a, ¶ 62.)

12. In the Seventh Circuit, the United States characterized the instant action as based on sovereign immunity, and *Hynes* as based on (Cont'd)

C. The District Court's Decision

The district court denied respondents' motion for summary judgment based on *res judicata* (App. Ptn. at 41a-50a); granted summary judgment against all interest penalties and the sale of the tax liens (*id.* at 50a-51a); and dismissed for want of jurisdiction the parts of the counterclaim not transferred to the Court of Federal Claims (*id.* at 57a-58a).[13] The district court

---

(Cont'd)
intergovernmental tax immunity under the Supremacy Clause of the United States Constitution. Yet its complaint and summary judgment briefs in the district court asserted mixed theories of tax immunity and sovereign immunity. E.g. R1, Compl. at 16; R63, Pltf. Mem. at 5. These were identical to the mixed theories petitioner asserted in *Hynes*, summarized in its supplemental brief in the Seventh Circuit. *See* RSupp 12(n) ¶ 69, Ex. B, *Hynes* U.S. Supp. Br. at 6-9; *see also* 20 F.3d at 1444 n.1 (Cudahy, J., concurring) and 1447-48, n.2 (Flaum, J., dissenting) (discussing the relationship between the two immunity doctrines). (A copy of petitioner's supplemental *Hynes* brief is attached to this brief in opposition as an appendix, referred to hereafter as "App. Br. Opp."; the pages cited above are reproduced there at 12a-15a.)

In its supplemental *Hynes* brief in the Seventh Circuit, the United States not only mixed its theories, but it also explicitly argued against *penalties and interest* included in the contested "taxes," *on sovereign immunity grounds*. App. Br. Opp. at 14a-15a. Petitioner only omitted the alternative argument in *Hynes* that, if it was not immune from *all* liability to Illinois taxes, it still might claim immunity from interest penalties and tax sales. Had it won *Hynes*, of course, such a limited alternative would have been unnecessary.

13. On respondents' motion under 28 U.S.C. § 1631, the district court transferred the two counts of the counterclaim which sought just compensation under the Fifth Amendment to the United States Court of Federal Claims. (App. Ptn. at 65a.) The United States appealed the transfer order under 28 U.S.C. § 1292(d)(4)(A) to the Federal Circuit, which reversed on the ground that failure to transfer *all* counts of the counterclaim violated 28 U.S.C. § 1500. *United States v. County of*
(Cont'd)

agreed that the only normal element of *res judicata* in dispute was identity of petitioner's causes of action in *Hynes* and the instant case, determined by whether the two cases arose from the "same transaction." App. Ptn. at 43a-44a. However, the court held that sovereign immunity may "trump" *res judicata* and required a three-tier analysis: (1) the "same transaction" test; (2) whether a claim of sovereign immunity from the same transaction in *Hynes* was actually decided; and (3) if such a claim from the same transaction was not decided, whether *res judicata* applied. App. Ptn. at 43a-47a.

In the first tier of its analysis, the district court held that claims regarding the tax sale and post-tax sale interest penalties were not from the "same transaction" as *Hynes*. Although the United States was aware of the tax sale proceedings during *Hynes*, the court held it was not obliged to amend its complaint to include "new issues"; and it held the tax liens were "useless" until the Seventh Circuit's *Hynes* ruling "made [their] purchase . . . a potentially profitable endeavor." App. Ptn. at 46a n.6.[14]

As to pre-tax sale interest penalties, the district court held that the claim by the United States was part of the same transaction as *Hynes*. However, the claim had not been decided

---

(Cont'd)

Cook, 170 F.3d 1084, 1089-91 n.8 (Fed. Cir. 1999). Following the Seventh Circuit's denial of rehearing in the instant case, respondents moved for transfer of all counts of the counterclaim. The United States has filed a "Statement of Non Opposition" to this motion, although it has sought a stay pending this Court's decision on the Petition for Certiorari. The district court postponed consideration of the stay motion until December 2, 1999, by its order of September 9, 1999.

14. The quotation is actually from footnote "3" of the district court's opinion. *See United States v. County of Cook, Illinois*, 1997 WL 639049 at *8 n.3 (N.D. Ill. 1997). The reprint of the opinion in the appendix to the Petition omits the first three footnotes and numbers the rest from "4."

due to the distinction between tax immunity and sovereign immunity. App. Ptn. at 46a-47a. Although the district court was troubled that the United States appeared to be taking "two bites at one apple," since it had raised a related immunity claim in *Hynes*, the court held that an unlitigated claim of sovereign immunity is never barred in a subsequent action. *Id.* at 50a. This ruling was based on the district court's interpretation of *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

On the merits, the district court granted summary judgment against the tax sale, based on sovereign immunity from suit in state court, holding that this was unaffected by § 602a(d)'s waiver of tax immunity. App. Ptn. at 50a-55a. The court held that sovereign immunity also barred pre-tax sale and post-tax sale interest penalties. *Id.* at 55a-57a. It distinguished *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209-210 (1946), in which this Court held that federal consent to state taxation adopted "established local tax assessment and collection machinery," and it declined to follow *Federal Reserve Bank v. City of Richmond*, 957 F.2d 134, 135-37 (4th Cir. 1992), where such federal consent was held to include penalties and interest defined as "taxes" by state law. *Id.* at 56a-57a. Finally, the district court held that sovereign immunity precluded jurisdiction of respondents' counterclaim. *Id.* at 57a-58a.

D. The Seventh Circuit's Decision

In an opinion by Judge Easterbrook, joined by Judge Ripple, the Seventh Circuit reversed. App. Ptn. at 1a, 167 F.3d 381. The Seventh Circuit held that sovereign immunity, as explained by this Court in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) ("*USF&G*"), is related to jurisdiction. In *USF&G*, Congress had not authorized the court in question to take jurisdiction of claims against the United States; without legislative authorization, sovereign immunity

deprived that court of power to enter a judgment against the United States with *res judicata* effect. App. Ptn. at 15a-20a, 167 F.3d at 389-90. In the instant case, however, sovereign immunity could not possibly have deprived the *Hynes* court of power to adjudicate the United States' own suit; therefore, it did not protect the United States from the risk of losing. App. Ptn. at 19a-20a, 167 F.3d at 390. Because all of the United States' interest penalty arguments, including those associated with the tax sale, were part of the same claim (App. Ptn. at 3a, 167 F.3d at 383), the *Hynes* judgment barred the instant complaint.[15] Judge Rovner dissented and would have affirmed the district court judgment. App. Ptn. at 21a-26a, 167 F.3d at 390-93.

The United States filed a petition for rehearing and suggested rehearing *en banc*. On April 30, 1999, the Seventh Circuit issued an order denying the United States' petition, stating that no judge in regular active service had requested a vote on the suggestion for rehearing *en banc*, and all of the judges on the panel had voted to deny rehearing.

REASONS FOR DENYING THE WRIT

I. REVIEW ON THE QUESTION OF *RES JUDICATA* IS UNWARRANTED.

The United States argues that "[t]he instances in which the principles involved in this case are applied are inherently few, for the United States routinely seeks to raise all appropriate issues — includeing [sic] immunity issues — in litigation that it commences or defends." Petition at 21. As discussed below, the instant case is no evidence for the second half of this

15. The Seventh Circuit's opinion noted in passing that a tax sale of the buildings today would generate a new claim because legal title has passed to the United States. App. Ptn. at 3a, 167 F.3d at 384. However, the opinion also noted, accurately, that all the respondents have sought in any event is collection of the tax monies. *Id.*

statement. As to the first half, if true, the fact that the *res judicata* issue is relatively unique to this case is hardly a justification for this Court's review.

The basis of the Petition for Certiorari is a supposed "emphatic conflict" between the Seventh Circuit's decision and the decision of this Court in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) ("*USF&G*"). *See* Petition at 14-15. Attempting to build such a conflict where none really exists, petitioner would transmute a rhetorical flourish of the Seventh Circuit's into its holding. *See* Petition at 14, 18. This elides the Seventh Circuit's real holding and analysis as well as this Court's analysis in *USF&G*. When the Seventh Circuit commented that the *USF&G* opinion "vanished from the law of judgments" it was referring to the dearth of citations to the opinion by this Court, and to the fact that no court has attributed to *USF&G* the "sweeping effect" argued by United States. App. Ptn. at 19a, 167 F.3d at 390. *USF&G* differed so materially from the instant case as not even to present the same question, let alone the "conflict" in principle which the United States would read into it.

The facts and this Court's ruling in *USF&G* were succinctly summarized by the Seventh Circuit's opinion:

> In *USF&G* the United States, as trustee for the Choctaw and Chickasaw Nations, filed a claim for $2,000 in the bankruptcy of the Central Coal & Coke Company. The coal company responded with a cross-claim for some $11,000, which the United States ignored — for claims against Indian tribes had to be filed in a "United States court in the Indian Territory", a category to which the bankruptcy court did not belong. Nonetheless the referee in bankruptcy allowed the coal company's claim, leaving it the Tribes' judgment creditor to the tune of $9,000. When the coal company attempted to

> enforce this judgment, the United States resisted on immunity grounds. After assimilating the sovereign immunity of Indian tribes to that of the United States [citation omitted] [this Court] observed: "No statutory authority granted jurisdiction to the Missouri Court [i.e., the referee in bankruptcy] to adjudicate a cross-claim against the United States." 309 U.S. at 512, 60 S.Ct. 563. After additional exposition the Court declared the referee's decision "void" to the extent it awarded the coal company relief in excess of setting off the original $2,000 claim.

App. Ptn. at 17a-18a, 167 F.3d at 389 (insertions supplied in part, original in part). As the Seventh Circuit accurately perceived, *USF&G* did not merely turn on the rule that sovereign immunity may only be waived by legislative action, and not any act or omission of government officials. More particularly, it was the absence of statutory authority which placed the first court's judgment in *USF&G* utterly beyond its judicial power. Only by reason of that lack of power was the judgment not *res judicata*.

In the instant case, however, the courts' statutory and constitutional authority to adjudicate the United States' own claim in *Hynes* was "beyond doubt," because the United States was the plaintiff and 28 U.S.C. § 1345 provided jurisdiction. App. Ptn. at 16a, 19a, 167 F.3d at 389, 390. The Seventh Circuit therefore concluded "that *USF&G* does not protect the United States from the risk of losing a case it brought on its own behalf in the proper court." App. Ptn. at 20a, 167 F.3d at 390.

The United States uses selective quotations to derive its repeated assertion: "[t]he conclusion of *USF&G* [was] that 'the doctrine of immunity should prevail' in ***any*** 'collision' with the doctrine of *res judicata* (309 U.S. at 514-515). . . ." Petition at 17 (boldface italics supplied); *see also id.* at 15, 16 n.6, 19.

But this Court has never said that "*any* collision" between the doctrine of sovereign immunity and *res judicata* must always be resolved in favor of immunity. What it said in *USF&G* was:

> The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that *the suability of the United States . . . depends upon affirmative statutory authority*. Consent alone gives jurisdiction to adjudge against a sovereign. *Absent that consent, the attempted exercise of judicial power is void.* The failure of officials to seek review *cannot give force to this exercise of judicial power*. Public policy forbids the suit unless consent is given, as clearly as *public policy makes jurisdiction exclusive by declaration of the legislative body*. Chicot County Drainage District v. Baxter State Bank [308 U.S. 371 (1940)] is inapplicable where the issue is the waiver of immunity.
>
> In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. * * * No solution was attempted of the legal results of a *collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion* . . . that *without legislative action the doctrine of immunity should prevail.*
>
> The conclusion that the Missouri judgment is void determines this review.

309 U.S. at 514-15 (emphasis supplied). To accept the United States' argument and extend *USF&G* beyond cases of void

judgments would vastly expand this Court's ruling. The Seventh Circuit appropriately refused such an expansion. App. Ptn. at 19a-20a, 167 F.3d at 390.

The United States also attempts to rely on this Court's passing comment in *Durfee v. Duke*, 375 U.S. 106, 114 (1963), that "[d]octrines of federal pre-emption or sovereign immunity may in some contexts be controlling." Petition at 16, 17. "May in some contexts," as the Seventh Circuit correctly noted, "poses but does not answer the question 'in *which* contexts?' " App. Ptn. at 17a, 167 F.3d at 389 (emphasis in original). The United States also claims that this Court cited to *USF&G* "with approval" in *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941), and *Great Northern Life Insurance Co. v. Reed*, 322 U.S. 47 (1944). Petition at 16. In fact, both decisions cite to *USF&G* for the proposition that legislative consent defines the power of a court to adjudicate a claim against the sovereign. *Jackson*, 311 U.S. at 500; *Great Northern*, 322 U.S. at 53-54. Neither case, nor any other the parties have found, takes *USF&G* beyond the context of a judgment which was void for want of legislative consent for the plaintiff to sue.

To the contrary, this Court's ruling in *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941), resembles, if anything, the Seventh Circuit's ruling in the instant case. In *Jackson* the district court granted judgment against the United States Alien Property Custodian under the Trading with the Enemy Act (40 Stat. 411, 419, as amended 42 Stat. 1511). The successful plaintiffs were U.S. citizens and residents and their former partnership was resident in New York; thus they were not "enemies" who would have been barred from suing under the Act. 311 U.S. at 497. Nine years later the United States filed a motion (which the district court granted) to vacate the judgment, arguing:

> that the judgment was void since it was not authorized by the Trading with the Enemy Act and thus the suit was a suit against the United States to which the United States had not consented and over which, therefore, the District Court had no jurisdiction.

311 U.S. at 497, 499. This argument claimed that a deceased partner of the plaintiffs was a German resident and an "enemy" within the Act. Although the United States had sought dismissal at trial based on the deceased partner's status, it did not then label the argument as "jurisdictional." *Id.* at 501-502.[16]

Affirming the Second Circuit's reinstatement of the original judgment, this Court said:

> We hold the argument untenable. *There is no question here of the sort presented in United States v. United States Fidelity & Guaranty Company, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894, of want of consent to be sued or of an attempt on the part of officials to waive the sovereign immunity.* The United States had expressly consented in section 9(a) of the Trading with the Enemy Act that suits might be brought . . .
>
> * * *
>
> By the provisions of that Act the jurisdiction of the District Court attached when the suit was brought upon the claim which the plaintiffs as non-enemy claimants set forth. *However the issues were labeled the court was authorized to determine them.* [Citations omitted.] *And whether a particular issue*

---

16. *See also* discussion in *Sorenson v. Sutherland*, 109 F.2d 714, 718-19 (2d Cir. 1940), *affd. sub nom. Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941).

> *was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree.* [Citations omitted.] If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken.

311 U.S. at 500, 502 (emphasis supplied). In other words, the prior judgment was *res judicata* notwithstanding that the United States' new argument was couched in terms of sovereign immunity. Significantly, this Court rejected the notion that *Jackson* and *USF&G* even raised the same question, because statutory jurisdiction in *Jackson* was clear.

The instant case is even farther from *USF&G*. Not only was jurisdiction indisputable in *Hynes*, but the United States' current sovereign immunity argument does not even contend, as it did in *Jackson*, that judicial power to enter the prior judgment was lacking. Here, sovereign immunity is merely an alternative theory on the merits of the claim against interest, penalties and tax sales. If the United States' theory in *Jackson* that the prior judgment was void did not implicate *USF&G*, its purportedly new theory in the instant case, which does not even question the prior judgment, cannot possibly implicate *USF&G*.

It must also be recalled that the sovereign immunity theory argued in this case is not new.[17] As noted above, the United States *did* assert sovereign immunity claims against interest penalties, and it *did* challenge tax liens and their potential or actual sale: it expressly complained of the interest penalties and tax liens, albeit while arguing for immunity from all "taxes," and it expressly argued sovereign immunity, albeit while also

---

17. Even the United States argues that it is only when immunity "was *not* asserted in the first case that it may be raised in a second action involving the same claim." Petition at 17 (emphasis in original).

arguing intergovernmental tax immunity under the Supremacy Clause. *See* App. Br. Opp. at 12a-15a (*Hynes* U.S. Supp. Br.); *see also* 20 F.3d at 1444 n.1 (Cudahy, J., concurring) and 1447-48 n.2 (Flaum, J., dissenting) (discussing sovereign and tax immunity arguments); *see also* R59, Ex. 10 ¶ 19 (*Hynes* Complaint), and R59, Ex. 11, Defs. Loc. Rule 12(l) Stmt., Pltf. Rsp. ¶ 14 (acknowledging that "taxes" were defined to include interest penalties under state law). All that the United States omitted in *Hynes* was a limited, alternative argument, in the event that its argument against all Illinois taxes failed. Its position here is surely no better than it was in *Jackson*, where it entirely omitted any immunity theory from its prior arguments.

The Petition for Certiorari recognizes that the Seventh Circuit viewed *USF&G* as limited to cases in which the prior judgment was void, as for want of subject matter jurisdiction. Petition at 19-20. However, the United States exaggerates and thereby mistakes the reasoning which led the Seventh Circuit to this view. Petitioner suggests that the Seventh Circuit substituted principles of subject matter jurisdiction in order to ignore sovereign immunity. *Id.* at 20. (The dissent made the same suggestion. App. Ptn. at 23a-24a, 167 F.3d at 392 n.2 (Rovner, J., dissenting).) However, the Seventh Circuit's opinion actually stressed the "close parallel" between principles of subject matter jurisdiction and sovereign immunity as applied in *USF&G*, and it noted this Court's "thoroughgoing equation of sovereign immunity to a jurisdictional shortcoming" in *USF&G*. App. Ptn. at 13a, 18a,167 F.3d at 387, 390. Such an analysis hardly ignores the principles of sovereign immunity.

The Seventh Circuit's opinion recognized that it is the interaction of sovereign immunity and jurisdictional principles, not substitution of one for the other, which is given effect in *USF&G*. Absent a statute waiving sovereign immunity and authorizing the cross-claim against the United States, the first

court in *USF&G* had no power to decide the cross-claim. The rule that government counsel could not waive immunity (nor stipulate to jurisdiction) was not insignificant; but its significance lay in that counsel's inaction could not supply the legislative authority (jurisdiction) which Congress had not provided. Compare *USF&G*, 309 U.S. at 514-15, with App. Ptn. at 17a-19a, 167 F.3d at 389-90.

The United States fundamentally suggests that there is some novelty in the Seventh Circuit's analysis of sovereign immunity as closely related to jurisdiction. Petition at 20. Yet this Court and the Courts of Appeals have repeatedly explained sovereign immunity in jurisdictional terms. As this Court stated in *United States v. Sherwood*, 312 U.S. 584 (1941):

> [t]he United States, as sovereign, is immune from suit save as it consents to be sued, [citations omitted] and the terms of its consent to be sued in any court *define that court's jurisdiction to entertain the suit.*

312 U.S. at 586 (emphasis supplied). In *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941), not only did this Court discuss a claimed violation of immunity as affecting subject matter "jurisdiction," but *the United States* framed its entire sovereign immunity argument in jurisdictional terms. 311 U.S. at 497, 499. As the Seventh Circuit held in *Edwards v. U.S. Department of Justice*, 43 F.3d 312 (7th Cir. 1994):

> Waiver of sovereign immunity is a jurisdictional prerequisite in the nature of . . . subject matter jurisdiction, in that unless sovereign immunity be waived, there may be no consideration of the subject matter.

43 F.3d at 317, *quoting Driskill, Inc. v. Abdnor*, 901 F.2d 383, 385 n.4 (4th Cir. 1990), *citing Hans v. Louisiana*, 134 U.S. 1

(1890). The only novelty here is the United States' contention that sovereign immunity and jurisdiction are not so-related.[18]

The United States also argues that

> [t]he panel majority's statement that *USF&G* does not protect the United States from the risk of losing a case it brought on its own behalf in the proper court . . . cannot be reconciled with the fact that in *USF&G*, as in the present case, the United States initiated the action that culminated in the judgment entered against it.

Petition at 20 n.12. Yet this supposed "fact" was simply not the case. The judgment against the United States in *USF&G* which was denied *res judicata* effect was on the counterclaim initiated by the coal company. In contrast, the set-off judgment against the Indian tribes' claim initiated by the United States was allowed *res judicata* effect. *USF&G*, 309 U.S. at 511. What "cannot be reconciled" with *USF&G* is not the Seventh Circuit's opinion, but the United States' argument. In *Hynes*, unlike *USF&G*, there was no counterclaim and indeed no claim at all except that initiated by the United States.

---

18. Other courts considering the ruling in *USF&G* have emphasized that it is a narrow exception to the principle that federal courts may conclusively and even implicitly determine their own jurisdiction. *In Re Bulldog Trucking Incorporated*, 147 F.3d 347, 352-53 (4th Cir. 1998); *Blinder, Robinson & Co., Inc. v. Securities & Exchange Commission*, 837 F.2d 1099, 1104 n.5 (D.C. Cir. 1988). Even in this narrow original context, the rule of *USF&G* has also been criticized by both courts and commentators. *Garrity v. Sununu*, 752 F.2d 727, 738 n.10 (1st Cir. 1984), *citing* C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction § 4429 [at 289-90] (1981) ("[i]t may be hoped that the principle of [*USF&G*] will be rejected in the future"). This Court need not concern itself with such criticism in this case, because *USF&G*'s question, whether sovereign immunity might have deprived a prior court's judgment of both jurisdictional support and *res judicata* effect, is simply not presented here.

The United States' criticism of the Seventh Circuit's reliance on *Montana v. United States*, 440 U.S. 147 (1979), as well as *Nevada v. United States*, 463 U.S. 110 (1983); *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); and *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273 (1906), is also flawed. *See* Petition at 22-23, and n.13; *compare* App. Ptn. at 6a-7a, 11a-12a, 167 F.3d at 385, 386-87. This argument tries to distinguish *Montana* and *Stauffer* as involving issue preclusion (collateral estoppel) rather than claim preclusion. However, *USF&G* has also been characterized as a case in which "collateral estoppel" was at issue, since the claim against the Indian tribes had actually been decided. *See* App. Ptn. at 23a, 167 F.3d at 391 (Rovner, J., dissenting), *citing USF&G*, 309 U.S. at 511. The meaningful distinction between *USF&G* on the one hand, and cases such as *Montana*, *Stauffer* and the instant case on the other, is the one the United States does not like: in *USF&G*, but not the other cases, the earlier judgment was beyond the judicial power of the court.

It is also worth noting that *Montana* was not a conventional example of collateral estoppel. The United States had not actually litigated the constitutionality of the state tax in the prior litigation; a federal contractor had done so. This Court relied on "the *related* doctrines of collateral estoppel and res judicata" in binding the United States to the former judgment. 440 U.S. at 153 (emphasis supplied). The Court also noted that "[p]reclusion of such nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action," and the causes technically differ when the parties differ. *Id.* at 154. However, a later evaluation of *Montana* emphasizes that the two suits were "on the same demand." *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 176 (1984) (White, J., concurring in the result). Precluding a non-party resembles *res judicata* more than true collateral estoppel, in that arguments which might

have been made by the non-party are barred as if they had been made.

The United States criticizes the Seventh Circuit's reliance on *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273 (1906), because it pre-dated *USF&G*, and *Nevada v. United States*, 463 U.S. 110 (1983), because it involved water rights. Petition at 22 n.13; *compare* App. Ptn. at 6a-7a, 11a, 20a, 167 F.3d at 385, 386-87, 390. It is hard to see this as more than quibbling. This Court did not overrule *Gunter* in *USF&G*, and indeed it did not suggest that the two cases involved the same issue — which was precisely the Seventh Circuit's point. *Nevada* remains a firm statement by this Court that the traditional doctrine of *res judicata* applies against the United States. 463 U.S. at 129-131. The Seventh Circuit's comment that the United States' present interpretation of *USF&G* "would have been a major stumbling block" to decisions like *Montana*, *Nevada*, and *Stauffer* remains apt. *See* App. Ptn. at 20a, 167 F.3d at 390. Traditional *res judicata* and collateral estoppel principles are abolished if they could only apply when the United States wins, or when its lawyers can no longer think of a new theory to cast in terms of sovereign immunity. Yet the United States conceded on oral argument in the Seventh Circuit that such a one-sided doctrine is the logical consequence of its argument. App. Ptn. at 8a, 167 F.3d at 386.

The Petition for Certiorari also faults the Seventh Circuit for stating that the reading of *USF&G* advocated by the United States "would make res judicata all but disappear for claims against the United States and make many judgments advisory in the process." Petition at 21, citing App. Ptn. at 19a (167 F.3d at 390). The United States argues:

> The instances in which the principles involved in this case are applied are inherently few, for the United States routinely seeks to raise all appropriate issues — includeing [sic] immunity issues — in

> litigation it commences or defends. There is no evidence that the United States has abused the sovereign immunity exception to *res judicata* recognized in *USF&G* in the sixty years since that case was decided. Certainly the present case reflects no such abuse: indeed, the issue of penalties and interest would not now be pending if, in the *Hynes* case, the Seventh Circuit had not overruled its own prior decision in [*County of Cook I.*]

Petition at 21. There is "no evidence that the United States has abused the sovereign immunity exception to *res judicata* recognized in *USF&G*," only because no court of which the parties are aware has ever interpreted *USF&G* as the United States argues until the district court did so in this case. *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941), where the United States unsuccessfully attacked an eight-year old judgment by recasting its original argument on sovereign immunity grounds, reflects the potential for protracted litigation if such an interpretation were adopted.[19] However, the preeminent example of such abuse must remain the instant case.

The United States would explain its behavior here by faulting the Seventh Circuit in *Hynes*, for surprising the United States by disagreeing with its argument, and for overruling *County of Cook I* where the United States had prevailed. Petition at 21. This rings hollow, considering that the United States deliberately chose not to seek review of *Hynes* in this Court. Throughout the instant case, the United States has characterized its predicament as the "failure" by its attorneys to argue sovereign immunity in *Hynes*. E.g. Petition at 19. The Seventh Circuit gave the United States the benefit of the doubt and

19. The district court in *Jackson* appears to have accepted an argument similar to the one the United States advances here, at about the same time that *USF&G* was on appeal, only to be reversed by the Second Circuit and this Court. *See* 311 U.S. at 499-500, 502.

essentially accepted this characterization. E.g App. Ptn. at 1a, 167 F.3d at 383 ("the United States now contends that because its lawyers neglected to invoke sovereign immunity it is entitled to a fresh adjudication"). However, a less tolerant examination of the instant record strongly suggests that the United States' apparent neglect in *Hynes* actually reflected a series of deliberate tactical or strategic litigation decisions.

In the first place, the United States did argue sovereign immunity and it did attack interest penalties in *Hynes*, although it chose to mix these arguments with its attack upon all state taxes levied against the subject buildings. *See* App. Br. Opp. at 12a-15a (U.S. Supp. Br. in *Hynes*). The United States received its first surprise, not in the Seventh Circuit's *Hynes* decision, but in the district court's refusal to enjoin the collection of several years of taxes. *United States v. Hynes*, 771 F. Supp. 928, 933 (N.D. Ill. 1991). It responded prior to the *Hynes* appeal by filing *County of Cook II*, its third lawsuit and the identical twin of its complaint in the instant case. *See* discussion *supra* at 8. Confronted with a *res judicata* motion, the United States voluntarily dismissed *County of Cook II* just over one month after it was filed. The United States pursued the *Hynes* appeal over the next three years, lost, and then refiled its complaint from *County of Cook II* in the present case, its fourth lawsuit.

Nothing in *USF&G* authorizes such a course of deliberate piecemeal litigation. The authority of the *Hynes* courts to adjudicate the United States' entire claim was indisputable. *USF&G* is simply a case in which sovereign immunity deprived the prior court of such authority. Accordingly, the principle of *USF&G* is not even material to the Seventh Circuit's decision, let alone in conflict with it, and nothing in that decision requires this Court's review.

II. REVIEW ON THE MERITS IS ALSO UNWARRANTED.

The United States also seeks review on the merits of its claim of sovereign immunity from the interest and penalties imposed as part of the delinquent "taxes" which it owed under Illinois law and 40 U.S.C. § 602a(d). Petition at 23-25. The request is based on the conflict between the decisions of the Fourth and Fifth Circuits, which held that this issue should be determined by reference to the definition of "taxes" under state law, and of the Ninth Circuit, which held that this determination should not refer to state law. *Id.*; *see Federal Reserve Bank v. City of Richmond*, 957 F.2d 134, 135-37 (4th Cir. 1992) (state law followed); *Reconstruction Finance Corporation v. Texas*, 229 F.2d 9, 11 (5th Cir. 1956), *cert. denied*, 351 U.S. 907 (1956) (state law followed); *United States v. Lewis County, Washington*, 175 F.3d 671, 676-77 (9th Cir. 1999), *petition for cert. pending*, No. 99-48 (state law not followed); *see also United States v. Consumers Scrap Iron Corporation*, 384 F.2d 62, 64-65 (6th Cir. 1967) (same; followed in *Lewis County*); *United States v. Mays*, 264 F.2d 317, 320-21 (10th Cir. 1959) (federal property subjected to state-imposed tax liens).

Curiously, the United States fails even to mention that each of these opinions turns on whether the Circuit was guided by this Court's decision in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946). There, this Court incorporated state law definitions of real property for purposes of determining the scope and extent of federal consent to state taxation, stating:

> We think *the Congressional purpose can best be accomplished by application of settled state rules* . . . To permit the states to tax, and yet to require them to alter their long-standing practice of assessments and *collections*, would create the kind of confusion and hampering of local tax machinery,

> which we are certain Congress did not intend. The fact that Congress subjected [the federal property] to local taxes "to the same extent according to its value as other real property is taxed" indicated an intent to integrate Congressional permission to tax with established local tax assessment and *collection* machinery.

328 U.S. at 210 (emphasis supplied). Opinions such as the Fourth Circuit's hold essentially that "application of state law [on the interest and penalty issue] is required in this case by *Beaver County*." *City of Richmond, supra*, 957 F.2d at 136. On the other hand, opinions such as the Ninth Circuit's hold that "the meaning of a waiver of immunity from state 'taxes' [is] to be determined by federal law, notwithstanding Beaver County." *Lewis County, supra*, 175 F.3d at 677.

Regardless of the extent of the conflict, however, this case affords no basis for this Court to resolve it. As the Court stated in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.

359 U.S. at 184. Here, *res judicata* prevented the Seventh Circuit from reaching the merits of the United States' claim of sovereign immunity from interest and penalties. As set forth above, the instant case affords the Court no basis to review the Seventh Circuit's decision on *res judicata*. Accordingly, resolution of the conflict among the Circuits would have no effect on the outcome of this case, and therefore it does not warrant this Court's review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois
PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5365

MARK RICHARD DAVIS
Counsel of Record
JASON T. SHILSON
O'KEEFE, ASHENDEN, LYONS & WARD
30 North LaSalle Street
Suite 4100
Chicago, Illinois 60602
(312) 621-0400

Attorneys for Respondents